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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 18.

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR,

Petitioners,

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN REPLY TO SUPPLEMENTAL BRIEF FOR PETITIONERS ON REHEARING.

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Respondents' main argument has been presented in their brief filed at the last Term. This brief is filed in reply to the supplemental brief for petitioners on rehearing, is confined to the points raised and arguments of petitioners thereon contained in petitioners' brief and it is not to be inferred that respondents by the filing of this brief abandon or waive any of the contentions or arguments by respondents contained in their main brief. For convenience the statements and

arguments of respondents contained in this reply brief are grouped under the same captions as are used in the supplemental brief for petitioners.

I.

THE FUNDAMENTAL ISSUE.

As stated, and for the reasons set forth, in Section I of respondents' argument (pages 18 to 27, inclusive, of their main brief) respondents contend that Section 4-II of the Bituminous Coal Act of 1937 applies only where there is a sale of or other transfer of title to the coal by the producer and to transactions or commerce in such coal which is sold or the title to which is otherwise transferred by the producer and that as the record in the case clearly shows and as found by the unanimous decision of the court below (R. 577) the transactions under review here involve no such sale or title transfer, the provisions of Section 4-II of the Act have no application to these transactions. That it was the intent of Congress not to subject to the provisions of Section 4-II coal or transactions or commerce in or in respect thereof which involve no sale of or other transfer of title to the coal by the producer is made abundantly clear by the Enacting Clause (Section 1) of the Act and by the express provisions contained in Section 4 of the Act.

The question as to whether or not in these transactions any sale of or other transfer of title to the coal by the producer occurs must be considered throughout in the light of the basic and undisputed fact that there is never, from the time respondents executed the operating contracts with their contractors to the time

when the coal is burned in the railroad's locomotives, any sale of or transfer of title to the coal between the contractors and respondents. As the record clearly shows, the contractors each definitely disclaimed any title or interest whatever in the coal and title to the coal is vested at all times in respondents (R. 97, 126). The contractor is throughout his operation performing work upon the property of others in which he admittedly has no interest whatever. The coal after being loaded in the cars supplied by respondents is shipped by respondents to themselves at various points for use in their operations and none ever reaches any other consumer. Under these circumstances we say there can be no reasonable doubt about the proposition that this coal is never within the field of operation of the regulatory scheme established by the Bituminous Coal Act. The long and bitter history of the conditions in commerce in bituminous coal in this country has been recently reviewed by this court and need not be here repeated. These conditions resulted, as the court has pointed out in *Appalachian Coals v. United States*, 288 U. S. 344, and in *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U. S. 381, in the demoralization of price structures in interstate commerce in coal resulting from the advent of competing fuels and excess productive capacity, coupled with the prevalence of unfair competitive practices, and these were the evils sought to be remedied by Congress by the Act.

Every word and every phase of the Act, beginning with its Enacting Clause (Section 1) emphasizes the preoccupation of Congress only with price regulations and transactions in coal which is sold or the title to

which is otherwise transferred by the producer. That Section 4 of the Act applies only to coal which is so sold or the title thereto so otherwise transferred is clearly recognized and confirmed in the provisions of Section 4-A of the Act, which is supplementary to Section 4. Section 4-A expressly provides in effect that when the Commission shall have found that the transactions in coal in intrastate commerce directly affect interstate commerce "thereafter coal *sold*, delivered or offered *for sale* in such intrastate commerce shall be subject to the provisions of Section 4."

The existence of what is commonly known as captive coal was fully known to Congress and to students of the problem and this type of production has been consistently ignored as not constituting a factor requiring Congressional attention.

The court below has held that the coal involved in this case is not within the scope of the Act and that the primary purpose of the Act was to provide for the fixing of prices for the sale of coal after it has been removed from the ground. (R. 577.)

Petitioners (Sup. Br. 2, 3) seek to bolster their contention that Section 4 is not limited to transactions involving a sale of or other transfer of title to the coal by citing as indicative that such was the Congressional intent the statement (contained in the part of Section 4 which immediately precedes Part I of that section) that the provisions of Section 4 "are intended to regulate interstate commerce in bituminous coal" and apply to "*matters and transactions* (italics theirs) in or directly affecting interstate commerce in bituminous coal." Respondents assert that such cited provisions were

obviously inserted only as indicative of the Constitutional ground upon which the power of Congress in the enactment of Section 4 of the Act is based; that the scope and application of the bituminous coal code provisions authorized in Section 4 to be promulgated are in no sense enlarged by such quoted provisions of Section 4 and that such scope and application are to be determined by the provisions of Part II of Section 4 unaffected by the above mentioned preliminary statement in Section 4 of the ground on which the legislative enactment is based.

Petitioners (Sup. Br. 3) cite the provisions of Section 4-II(e) that "no coal subject to the provisions of Section 4 'shall be sold *or delivered or offered for sale*' (italics theirs) at a price below the minimum or above the maximum established by the Commission," and point to the use of the disjunctive form of expression as sustaining their contention that Section 4-II of the Act is not limited in its application to matters and transactions which involve a sale of or other transfer of title to the coal by the producer. As above stated, and as more fully set forth in Section I of respondents' argument in their main brief, the entire Act, beginning with its Enacting Clause (Section 1), points unmistakably to the intent of Congress to limit and restrict the application of the provisions of Section 4-II of the Act to transactions in coal which is either sold or the title thereto otherwise transferred by the producer.

As evidencing the attitude in other cases it is significant that the Director in the matter of *Varney & Rose*, Docket No. 1538-FD, decided on July 28, 1941, holds that "the essence of the Bituminous Coal Act

is price regulation," and in his Cease and Desist Order, issued on July 26, 1941, in Dockets Nos. 1548, 1549, 1550, 1553 and 1554-FD, that "whatever the 'problem' may be, the stubborn fact is that the scheme of regulation and control provided in the Bituminous Coal Act is centered around the price provisions."* This is clearly the view of the court below in holding that Section 4-II of the Act applies only where a sale of or other transfer of title to the coal by the producer is involved, that in the case at bar no such sale or title transfer occurs, no price upon which Section 4-II can operate exists, and that the provisions of Section 4-II are inapplicable to the transactions under consideration herein.

The contention of petitioners (Sup. Br. 3, 4) that the substance of the transactions under review is that respondents agreed to buy their coal from two persons—an owner of coal lands and a coal mine operator—and to pay each separately; that such transactions are no different from that of a sale and that the sole effect of placing the mineral rights in the name of respondents was to avoid a technical transfer of title from the operator to respondents, are wholly at variance with the facts as disclosed by the record. Such an argument ignores the fundamental facts—abundantly shown by the record—that in the case of each of the three mines the contractual engagements and obligations as between the landowners and respondents on the one hand and as between the contractor and respondents on the other hand are entirely separate and distinct and are evidenced by separate instruments which by

*Decisions and orders of the Director are issued in mimeographed form and are not reported.

their terms and in legal effect are in each case binding only as between the parties to such instruments; that the lease from the landowners to respondents granted respondents and respondents alone the exclusive right to extract and mine the coal, or cause same to be extracted and mined, for respondents' own consumption and imposed royalty payments and other obligations set forth in the leases (or by appropriate reference therein) upon respondents which are enforceable by the landowners only against respondents. Such royalty payments and other obligations are assumed by respondents under the William Ann mine lease under sections 3 to 11, inclusive, of that lease (R. 225-228, inclusive), in the Glamorgan mine lease in sections 3, 4 and 5 thereof (R. 164-166, inclusive), and in the Chilton Block No. 1 mine lease in articles 5, 7, 8 to 10, inclusive, 12, 13, 17, 18, 21, 22, 24 and 26 of the lease of Dingess-Rum Coal Company to Chilton Block Coal Company (referred to on page 241 of the record), the performance of which is expressly imposed upon and assumed by respondents under their agreement with Dingess-Rum Coal Company (R. 241).

Clearly if respondents should default in the payment of the royalties specified in their agreements with the landowners or in any of the numerous other obligations imposed upon respondents thereunder, respondents and respondents alone would be answerable in damages.

The fact that the leases from the landowners to respondents and the agreements of respondents with the contractor employed by respondents to extract, mine, load and ship the coal to them for their exclusive

consumption are co-extensive in duration or contain provisions which would enable respondents at their option to terminate both the leases and the operating contracts simultaneously can not make the contractor the owner and seller of the coal produced at these mines. The arguments of petitioners upon this point involve a conception that respondents acquired the right to take the coal from the land and agreed to make payment of the royalties directly to the landowners for account of and under some imagined species of agency for the contractor. Petitioners assert that on the facts, as disclosed by the record, such a theory is wholly unsupported, ignores completely the contractual rights and obligations of the instruments as between the landowners and respondents, in respect of which the contractor occupies no relation whatever of privity, and is highly fantastic and wholly unsound.

Petitioners contend (Sup. Br. 4) that respondents have not made any investment in coal lands. The record shows clearly the contrary. Respondents are obligated to pay the landowners minimum royalties amounting to approximately $30,000 per year. They are obligated to pay, and have paid, the tax of one cent (1c) per ton, or more than $6,000 per year, levied by Section 3(a) of the Act; are also obligated to pay and have paid taxes assessed against the land and mineral rights at the William Ann mine amounting to over $9,000, and in the William Ann and the two other mine cases numerous other taxes which are included in the compensation paid the contractor. As hereinbefore stated, respondents and respondents alone are obligated to the respective landowners not only to pay the minimum royalties but to perform the numer-

ous other obligations assumed by respondents under the leases, and respondents alone are answerable to the landowners for the breach of such obligation.

Respondents are bound under their contracts to reimburse the contractor through adjustment of the tonnage compensation rate paid the contractor for his services for every cost involved in the process of mining which is beyond the contractor's control, which costs include wages, taxes, mining equipment and supplies and constitute the major elements of production costs and such contracts protect the contractor against all risks except those attributable to his own inefficiency.

Petitioners devote a considerable portion of their supplemental brief (pages 4 to 9, inclusive), to what they term the interdependence between the leases from the landowners and the agreements with the contractors and argue that the substantive effect of the transactions, considered as integral parts of the same transaction, are no different from that of a sale of the coal by the contractor to respondents. The case of *Helvering* v. *Le Gierse*, 312 U. S. 531, cited by petitioners in this connection, is clearly not in point and gives no support to petitioners' contention. There the two contracts involved—one a contract of annuity and one of insurance—*were between the same parties* and were held by the court to be opposite, the one neutralizing the risk inherent in the other. Here the leases are from the landowners to respondents and the operating agreements are between the respondents and the contractors. These instruments are separate and distinct, involve no neutralization of risk or obli-

gation, create no privity relationship of the landowner to the operating agreement or of the contractor to the lease, and in the transactions here under consideration there is no similarity in fact or principle to *Helvering* v. *Le Gierse*, supra.

In their effort to support their contentions the petitioners wholly ignore the essential and determinative facts disclosed by the record and erroneously state or imply facts at variance with those shown by the record. The leases do not, as petitioners assert, provide for the automatic termination thereof upon termination of the operating contract for any reason whatever. Exercise by the respondents of their right of renewal of the leases is in no way dependent upon renewal by respondents of the operating agreements nor is renewal of the operating agreements by respondents in anyway dependent upon renewal of the leases. The William Ann mine lease (R. 205) contains no provision whatever terminating that lease, or giving respondents the right to terminate it, upon termination of the operating agreement. The Glamorgan mine lease (R. 169, 178) only gives respondents the right, if they so elect, to terminate that lease in the event of the exercise by respondents of any right in respondents to terminate the operating contract. The Chilton Block No. 1 mine lease (R. 236, 239, 243) automatically terminates upon termination of the operating agreement only in the event of termination of the latter agreement in the exercise by respondents of the right of termination for a cause specified in that agreement. On the other hand the William Ann lease unquestionably continues unaffected in the event of termination of the operating agreement and in that case, in the

case of the Glamorgan lease and in the case of the Chilton Block No. 1 mine lease (if the operating agreement be terminated for any cause other than the exercise by respondents of their right of termination thereunder) respondents would be in position in each case to continue the leases and effect other arrangements for the extraction and mining of the coal.

The arguments of petitioners that respondents do not enjoy any of the privileges of ownership and could never regain the right to extract the coal themselves are wholly unsupported by the facts. Each of the leases gives the respondents and respondents alone the right to extract and mine the coal or cause same to be extracted and mined for their own consumption and prohibits the assignment by respondents of such rights without the previous written consent of the landowners. The sole and exclusive right and title to the coal, the *jus disponendi*, is by the terms of the leases and in law vested in respondents and the coal is being extracted and mined in the right and as the property of respondents. The extracting and mining of the coal through the instrumentality of the contractor employed by respondents to perform such service for them, and the disposition of which by respondents is, under the uncontradicted evidence in the case, within the sole dominion of respondents, clearly constitute the exercise and enjoyment by respondents of privileges of ownership. Further evidence of the enjoyment by respondents of ownership privileges in the coal is shown by the fact (R. 190, 263, 301, 326) that each of the operating contracts provides that so-called "house coal" sold is sold for account and as the property of respondents. In the face of the facts above stated,

which are clearly established by the record, the statement that respondents do not enjoy any of the privileges of ownership of the coal produced at these mines and could never regain the right to extract the coal themselves is simply untrue. As well say that the owner of building materials acquired for use in the construction of a house for his own use, who employs a carpenter to build the house for him, by such employment loses his privileges of ownership of the materials. That such employment is an exercise and enjoyment and not a relinquishment of the privileges of ownership of the materials is, we think, self-evident. The further argument of petitioners that because the leases and operating contracts are co-extensive in duration it results that respondents part with the right to themselves extract the coal is not only factually incorrect but provides no logical support for petitioners' contention that in effect the transactions are sales of coal by the contractors to respondents. The contractors extract the coal solely by virtue of their employment by respondents to perform that service for them and they neither have nor claim title to or ownership or right of disposition of the coal. Respondents are the sole causative force in the production of the coal and we are unable to perceive how the performance by the contractors for respondents of the service of extracting and mining the coal for a period co-extensive with the leases can possibly operate to vest in the contractor any ownership of the coal or make him the seller of the coal.

Petitioners further contend (Sup. Br. 9) that while the contracts were in effect the contractors were forced to compete with other producers. This argument

assumes the contractor to be the producer of the coal, a contention completely refuted by respondents' argument contained in their main brief (Brief pp. 59, 60, 61).

On page 10 of their brief petitioners argue that approval of the transactions here involved would result in similar arrangements by consumers of small amounts of coal. The hypothetical case of a small consumer is readily distinguishable from the transactions here. In the instant cases the leases give respondents the exclusive ownership of all coal extracted from the mine, obligate respondents to pay royalties on all of the coal so extracted, during the period of the lease, and make capable of definite and ready identification the coal in which title in the respondents vests. Obviously in the case of a small consumer these conditions would not exist.

II.

RESPONDENTS' ARGUMENT BASED UPON THE PROVISIONS OF SECTION 3.

Petitioners' argument (Sup. Br. 11) under this heading consists of two contentions—first, that the transactions involved are in substance sales of the coal by the contractor to respondents, that the contractor is the producer and that on such theory the coal is coal sold by the producer and subject on that ground to Section 3—the tax provisions of the Act. Petitioners' second contention is that even if, as respondents contend, the transactions do not constitute sales of the coal by the contractor they must be considered as a "disposal" of the coal, as that term is defined in Section 3 of the Act. Respondents submit that these

contentions are effectually refuted by their argument on pages 26, 27, 39, 40, 56, 57, 58 and 59 of their main brief. Admittedly, the tax imposed by Section 3 is only upon coal when sold or otherwise disposed of by the producer. If, as petitioners contend and respondents deny, the contractor, who, as the undisputed evidence shows, neither has nor claims any right to sell, consume, use or dispose of the coal, is the producer of the coal, respondents reassert that no field for application of the tax provisions of the Act would exist.

Respondents contend that in the facts of this case the activities of the contractor in loading and shipping the coal are in no sense a disposal of the coal by the contractor within the meaning and intent of Section 3 of the Act. The coal is the property of respondents in which the contractor admittedly has no rights of ownership or disposition. It is shipped by the contractor as the agent of respondents to respondents and consumed by them. The acts of the contractor in loading and shipping the coal, even assuming such acts constitute a disposal thereof within the meaning of Section 3, which respondents deny, are acts exercised by the contractor in the right of respondents and can constitute no disposal by the contractor of the coal. Clearly it is not the intent of Section 3, applied to this case, to treat the acts of loading and shipping the coal by an agent for his principal as a taxable "disposal" of the coal.

III.

RESPONDENTS' ARGUMENT THAT THEY BEAR THE BURDEN OF THE MINING OPERATIONS.

It appears from petitioners' supplemental brief (pp. 11, 12) that they have [as indeed they must under *Phelps-Dodge Corporation* v. *National Labor Relations Board*, No. 387, October Term, 1940, decided April 28, 1941] abandoned their former contention, denied by respondents, that the exemption provisions of Section 4-II(l) of the Act apply only to producers engaged in the business of mining coal. Respondents reaffirm the contentions in their main brief (pp. 15, 41) that even assuming that the phrase "engaged in the business of mining coal" as used in Section 17(c) of the Act is at all determinative of the right of exemption of respondents under Section 4-II(l), respondents do, as fully explained in their main brief, bear the burden of the mining operations, are clearly the causative force of the production of the coal and are "engaged in the business of mining coal," if this latter requirement be a determinative factor of their right to exemption under Section 4-II(l) of the Act. (R. pp. 51 to 56, inclusive). The phrase "engaged in the business of mining coal" as used in Section 17(c) is not used in a technical jurisdictional sense, but with reference to the economic activity or enterprise of coal mining, including the sale or other disposal of the property. Since respondents absolutely control the mining of the coal and pay all the costs, they are engaged in the business and they are the producers within the intention of this section.

The word "producer" as used in Section 4-II(l)

is of broader significance than the term as partly defined in Section 17(c) and is employed therein having reference to all the provisions of the Act. The Act applies to the two following classes of coal:

> (i) Coal owned in place and after its extraction consumed by the same owner thereof;
>
> (ii) Coal owned in place by one owner and disposed of after extraction by sale or otherwise to another and different owner.

Coal of both classes is dealt with in Section 3—the tax section of the Act. It seems plain that coal exempted by virtue of Section 4-II(l) of the Act includes coal of the first class which is produced either by the owner thereof personally or through agencies or instrumentalities employed by such owner. Coal produced personally by the owner in place or through such agencies or instrumentalities is subject to the tax levied by Section 3(a). As we have pointed out above, respondents have regularly paid the tax as the producer of this coal.

Petitioners erroneously state or imply (Sup. Br. 15) that respondents have no control over the rates of pay and salaries over which the contractor has control. The provisions giving respondents such control, referred to by petitioners as in the original contracts, have never been modified or changed and are still of full force in the William Ann and Chilton Block mine contracts and in practical effect in the Glamorgan mine contract. The effect of the renewal in April, 1937, of the Chilton Block mine contract was not, as petitioners state, to eliminate paragraph 7(a) of the original contract or to substitute therefor paragraph

(3) of the renewal agreement. This paragraph (3) does not relate in any way to the provisions of paragraph 7(a) of the original contract giving respondents such control and such provisions are unaffected by the 1937 renewal agreement (R. 316, 317). This clearly appears from paragraph (7) of the last mentioned agreement which continues such provisions of paragraph 7(a) of the original agreement in full force. In the case of the Glamorgan mine, as in the other two cases, in each successive renewal or extension of the contract the revised compensation of the contractor was fixed in conference with him in which he submitted his estimate of production cost, including any increases in rates of pay and salaries over which he had control affecting such cost, and such increases were included in his revised compensation only if and when approved by respondents.

IV.

THE EXTENSION OF THE STATUTE.

The discussion of the petitioners under the above heading in their supplemental brief (p. 16) can have no influence upon the decision of this case. The report of the Senate Committee (Sen. Rep. No. 169, 77th Cong. 1st Sess.) is no more a disapproval of the decision of the Fourth Circuit Court of Appeals (114 F. (2d) 752—R. 573, 580) and of this court than it is an approval. Language more appropriate could have been used to indicate this fact, but a reading of the statement made to the committee by Mr. Abe Fortas, General Counsel for the Bituminous Coal Division of the Department of the Interior (Hearings before a Senate

subcommittee of the Committee on Interstate Commerce, 77th Congress, 1st Session, on S. J. Res. 22, S. J. Res. 32, H. J. Res. 101, and H. R. 4146, April 2nd and 3rd, 1941, pp. 18 to 30) makes it very clear that the inclusion of the language quoted on page 16 of petitioners' supplemental brief was inserted at the request of Mr. Fortas and was not designed to indicate a disapproval of the decision of the Circuit Court or of the Supreme Court. On pages 18 and 19 of the Committee Report is the following:

> "MR. FORTAS: It would be a tough case; a very difficult case. The committee knows of the doctrine of legislative affirmance of a court decision. It may be that if the committee recommended to the Congress that this act be extended, and if the Congress extended this act without steps such as I shall indicate in a moment, the court would say that that amounted to a legislative confirmation of the Supreme Court decision, and we would not have a run for our money when we brought the case up for rehearing before a full bench.
>
> "We ask the committee, therefore, in its report, if it sees fit to do so, to indicate very clearly that its recommendation to the Congress is not intended to include an implication that it approves the decision of the Supreme Court. We are not suggesting an amendment to take care of the Supreme Court decision at this time, because we believe that we can get it changed on reargument; and also, frankly, we would have a great deal of difficulty in drafting an amendment which would spell out what we believe to be the intention of Congress any more clearly than it is spelled out now in the act.

"SENATOR BONE: Would we not ourselves be confronting something of a dilemma?

"MR. FORTAS: I do not think so, Senator Bone. It seems to me that the committee could properly indicate that it is taking no action one way or the other on this matter, in view of the fact that a petition for rehearing is to be filed.

"SENATOR BONE: You suggest, then, that that be in the nature of a statement in the committee report rather than something that would be an attempt to enact a law?

"MR. FORTAS: Yes, sir; I do."

The report of the committee does not in any way indicate what action either or both houses of Congress would have taken had the whole matter been thrown open to discussion.

CONCLUSION.

The decision below should be affirmed.

Respectfully submitted,

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